IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

FIRST APPEAL NO.548 OF 1988

M/s.Munshaw Industries
Proprietor, Texind Corporation
Pvt. Ltd., Mathuradas Mills
Compound, Lower Parel, Bombay-13 ... Appellant

V/s.

Employees' State Insurance
Corporation, ESIC Building,
Shahid Bhagatsingh Marg, Colaba
Bombay - 400 005 ... Respondent

Mr.P.L. Naik for Appellant
Mr.M.V. Jaykar for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **OCTOBER 7, 2004**

ORAL JUDGMENT:

. This is an Appeal under section 82 of the Employees State Insurance Corporation Act against the order of the Employees State Insurance Court The trial Court has found that the appellant and its sister concerns are liable to pay a certain amount as contributions to the Employees State Insurance Corporation with interest @6% per annum.

2. Five establishments which according to the appellant are independent of each other are being run by various members of Munshaw family. According to the appellant, Munshaw Industries, a proprietory concern, is a manufacturing unit and is taken over by Texind

Corporation. Texind Corporation is a trading concern dealing in export of goods manufactured by Munshaw Industries. Munshaw Engineering Industries Private Limited manufactures electronic goods, yarn, cleaners, stabilisers, ribbon racks, etc. Munshaw Investment Company is an investment Company. Paramount Services conducts the maintainance, erection and servicing of machinery of Texind Corporation. According to the appellant, the godowns and establishments of the first three concerns are situated in one compound at Lower Parel, Mumbai. The other two establishments are situated in Fort, Mumbai. However, the registered offices of all these establishments are in the same place in Mumbai.

3. On 4.6.1981, the Insurance Inspector of the Employees State Insurance Corporation inspected the records of M/s.Munshaw Industries and found that contribution towards the Employees State Insurance Corporation had remained unpaid by the appellant. On 22.12.1983, the Corporation called upon the appellant to pay the contributions under the Employees State Insurance Act since they employed 21 workmen in their various establishments which they considered as one unit. After completion of the inspection, etc., the Deputy Director of the Corporation passed an order 28.12.1985 under section 45A directing the appellant to

pay Rs.303338/- as contribution towards the Employees' State Insurance.

4. Being aggrieved by this order, the appellant preferred an application under section 75 of the Employees State Insurance Corporation Act (for short, hereinafter referred to as 'the Act') before the Employees State Insurance Court on 2.4.1985 claiming that the Act was not applicable to it. The appellant claimed that it employed only about 5 to 7 employees which was far less than the number of employees required for being covered under the Act. A preliminary issue was framed and decided by the ESI Court regarding the applicability of the Act. On 12.8.1986, the ESI Court held that the provisions of the Act applied to the appellant. Aggrieved by this decision, the appellant filed appeal No.531 of 1986. The High Court dismissed the appeal by directing the ESI Court to determine the amount liable to be paid by the appellant. After the remand, the ESI Court decided that the appellant was liable to pay the contribution as there was functional integrality between the units and therefore, the number of employees working in each of these units were to be considered in the aggregate. By another order of 14.3.1988, the ESI Court directed that an amount of Rs.193974.54 plus Rs.43,644.27 (which amounts were mentioned in the show-cause notice) plus Rs.12,177.90

was payable as contribution and interest by the employer. Aggrieved by these orders, the present appeal has been preferred under section 82 of the Act.

5. The main contention raised on behalf of the appellant is that the five units cannot be considered as a factory since they are disparate units with separate Income-Tax assessment numbers, filing separate returns and having different licences under the Shops and Establishments Act or the Factories Act as the case may be for the respective units. According to the appellant, the workmen employed in the five units were different and the establishments were also situated at varied places. It is, therefore, submitted on behalf of the appellant that the provisions of the Act do not apply since the units cannot be considered to be a ‘factory’ employing 10 or more persons with power or 21 persons without power.

6. Mr.Jaykar, appearing for the Respondent-Corporation, submits that the registered offices of three concerns are in the same premises without there being any partition. A common power supply is used by all the different concerns, the billing being in the name of Texind Corporation. He submits that none of the said units share the electricity bill with Texind Corporation Pvt. Ltd. and, therefore, it shows that

these units are sister concerns as admitted by C.B. Patel, the manager of all the units. It is further urged that Munshaw Industries and Paramount Services do work exclusively for Texind Corporation Pvt. Ltd. The storage space used by all the five units is in the godown of Texind Corporation. The workmen admittedly are interchanged and transferred within these five units. He therefore submits that the evidence of C.B. Patel, witness of appellant, amply demonstrates that the five units are considered separate only for the purposes of avoiding certain labour laws.

7. He relies on the judgment of the Division Bench of this Court in the case of *J.G. Vakharia v/s. Regional Provident Fund Commissioner*, **1957 I LLJ 448**:**FJR Vol. XIII 231** and in the case of *Madona Textiles v/s. Employees State Insurance Corporation,* **2000 II LLJ KERALA 1422** of the Kerala High Court.

8. Both the learned Advocates have taken me through the judgment of the trial Court and the evidence led before it in great detail. The evidence discloses that Texind Corporation is a trading concern which trades in the products manufactured by Munshaw Industries and Munshaw Engineering Pvt. Ltd. Munshaw Investment Company looks after the investments and financial aspect of all the concerns whereas Paramount Services is

responsible for the erection and the maintainance of the machinery for Texind Corporation and also oversees the advertisement of various products of all the units. The evidence of the witness for the appellant discloses that the five units are run by the Munshaw family and although they pay income tax as separate units they are for all practical purposes only one unit. In fact, the machinery manufactured by the two units is sold by the third and marketed by the fourth i.e., Texind Corporation and investments and financial aspects of the five units are taken care of by Munshaw Investment Corporation. In these circumstances, I see no reason to differ from the view taken by the ESI Court.

9. The Division Bench of this Court in *J.G. Vakharia* (supra) considered the case where a silk mill was being run as a partnership concern by a father and son. After the death of the father, the son entered into a partnership with his two major sons. Shortly before the advent of the Employees Provident Funds Act, 1952, the partnership concern closed down the manufacturing business. Subsequent to this agreement, five units were started which were concerned with the manufacturing process which were originally being carried out by the silk mill. Five rent notes were executed in favour of the silk mill by the Petitioner in that matter and his four sons, two of whom were minors.

Since the factory licence issued to the silk mill was surrendered separate licences were issued to the five units under the Bombay Industrial Relations Act and the five units were recognised as separate undertakings. According to the Petitioner in that case, there were five separate assessment of these units. While considering the question as to whether the various units run by members of the family could be considered as distinct and independent units or as a subterfuge to avoid the liability of contribution under the Employees Provident Funds Act, 1952, the Court observed thus:

> . .... It is well-settled canon of taxation law that a subject is entitled to avoid paying tax if legally he can do so. Even that canon is looked at rather askance in the context of times taht we are living in, but the Act that we are dealing with is not a taxation law. It is a social legislation and the canon of construing a social legislation is very different from the canon of construing a taxation law. The court must not countenance any subterfuge which would defeat the provisions of a social legislation and the court must even if neessary strain the language of the Act in order to achieve the purpose which the legislature had in placing this legislation on the statute book. Therefore, not only the court must disapprove all subterfuges to defeat a social legislation but must actively try to prevent such subterfuges succeeding in their object. In our opinion, this is a clear case of a subterfuge and this subterfuge cannot be permitted to succeed so as to defeat the rights of the employees who are benefited by the Employees' Provident Funds Act.

10. In the present case, there is no doubt that the five units are paying income tax separately only as a

subterfuge in order to avoid payments to be made under the Act and other related statutes.

11. In *Madona Textiles* (supra), the Kerala High Court has held that when there is geographical unity, functional integrality and unity of management among the units in question to a large extent, the employees of all the units could be considered as being employed in one unit. The Kerala High Court has relied on the judgment of the Apex Court in the case of *ACC Limited v/s. Workmen*, **AIR 1960 SC 56.** In the present case, there is no doubt that there is geographical unity and functional integrality in the management of the units. In *Esha Steel* (supra), the Apex Court was of the view that while considering the provisions of section 25FFF and 25G of the Industrial Disputes Act, notwithstanding the fact that the nature of business carried out by the firm running the two factories was the same, the closure of one factory did not hamper the existence of the other and, therefore, there was no functional integrality.

12. In the present case, the evidence on record is unambiguous and establishes the fact that there was functional integrality between the units, therefore the five units can be considered as one factory. The business and work of one unit was not independent of the others. The ESI Act is applicable to all factories.

The word "factory" has been defined under the said Act in section 2(12) as meaning the premises including the precincts thereof wherein 10 or more persons were employed on wages in the preceding 12 months and in which a manufacturing process is being carried out with the aid of power or where 20 persons are employed in a manufacturing process, without the aid of power. Under section 2(14AA), ‘manufacturing process’ is assigned the same meaning as manufacturing process under the Factories Act. There is no doubt that the five units which are situated either in the same premises or in the precincts of the premises are involved in manufacturing process and therefore, the ESI Act is applicable as the number of employees working in each of the five units was between 5 and 7.

13. The order dated 26.11.1987 is, therefore, upheld. However, the order dated 14.3.1988 relates to the actual payment due from the appellant. The trial Court has found that from January 1980 to 31.3.1980 and from 1.1.1983 to 31.3.1983, the contribution payable by the appellant was Rs.193974.54 plus an amount of Rs.12177.90, which according to the trial Court had not been included earlier. The trial Court found from the report at Exhibit R22 of one Khubchandani, the Insurance Inspector, that the contribution of Rs.12177.90 was not included by the Corporation in its original claim. The

trial Court however has included this amount while allowing the claim of the Corporation. Mr.Naik for the appellant has rightly taken exception to the inclusion of exhibit R22. Admittedly, a showcause notice was issued for an amount of Rs.303338/- based on the wage bill of Rs.43,33,41,027.70. This amount included the sum of Rs.15,62,337.25 which was payable to those employees who did not fall within the purview of the Act since the monthly salary was beyond Rs.1,000/-. Therefore, the claim made by the Corporation was limited to Rs.27,71,064.92 against which the application was filed under section 75 of the Act. The trial Court therefore could not have enhanced this claim by including an amount of Rs.12,177.90. The contribution payable is only on the wage bill of Rs.27,71,064.29 together with interest on the amount of Rs.43,644.27/-. Accordingly, the appellant is liable to pay Rs.1,92,974.54 plus Rs.43,644.27. The appellant is also liable to pay a further interest @6% from 1.3.1985 till the date of payment.

14. First Appeal is partly allowed. The judgment and order dated 26.11.1987 of the ESI Court is confirmed. The judgement and order Part II dated 14.3.1988 is modified to the above extent.